

No. 80532-6

ORIGINAL

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SUPREME COURT OF THE STATE OF WASHINGTON

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RENTAL HOUSING ASSOCIATION OF PUGET SOUND, a  
Washington non-profit corporation,

Appellant,

v.

CITY OF DES MOINES, a Washington municipal corporation,

Respondent.

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BRIEF OF RESPONDENT CITY OF DES MOINES

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## **I. INTRODUCTION**

This case involves a complaint filed 17 months after the City of Des Moines claimed that records requested by Appellant were exempt from disclosure under the Public Records Act. Pursuant to the one year statute of limitations in RCW 42.56.550(6), Judge Deborah Fleck dismissed all claims related to this response as untimely. This appeal challenges whether the statute of limitations bars the action as untimely.

## **II. ISSUES PRESENTED**

1. Whether the trial court properly dismissed this action because it was commenced more than one year from the date the City of Des Moines claimed that its records were exempt?
2. Whether the statute of limitations is tolled where a requestor contests the adequacy of the City's "claim of exemption"?
3. Whether the City waived the statute of limitations by inequitable conduct where it timely raised and briefed the issue to the trial court?

## **III. STATEMENT OF FACTS**

This case arises from a public records request made by the attorney for Rental Housing Association (RHA) in July 20, 2005, seeking information in twelve different categories concerning adoption of a crime free rental housing program. **CP 48.** The City of Des Moines responded on August 17, 2005, by producing 593

pages of records. The City withheld the requested records in the City Attorney's files, which it claimed were exempt. **CP 53.**

In its August 17, 2005, response, pursuant to RCW 42.56.210(3),<sup>1</sup> the City identified the contents of the withheld files and claimed specific statutory exemptions applied, including the attorney-client privilege, the controversy exception, the attorney work product doctrine and the internal deliberative process exemption. **CP 58-59.**

In response to the City's partial denial of the request for the City attorney files, RHA immediately threatened to sue, noting in an October 7, 2005 letter that the claimed exemptions "clearly would not fall under any of the PDA's exemptions." **CP 60.** RHA demanded production of the withheld documents, again threatening suit for non-compliance that could result in an award of costs, attorney fees and penalties. **Id.** On October 12, 2005, the City responded by affirming that the documents were properly withheld and that the basis was properly stated as set forth in former RCW 42.17.310(4). **CP 63.**

On January 25, 2006, the Appellant wrote again to the City attorney to demand an immediate response and again threaten

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<sup>1</sup> Formerly RCW 42.17.310(4).

filing a lawsuit for "tens of thousands of dollars." **CP 65.** In this letter, RHA conceded that the City had claimed an exemption on August 17, 2005, stating:

The city produced selective public records on August 17, 2005, while admittedly withholding approximately 600 pages of unidentified responsive documents, generally claiming them to be exempt under RCW 42.17.310(1)(i) or (j).

**CP 65.**

In addition to the threatened lawsuit over the City's August 17, 2005 response, this letter also contained a second public records request for four categories of documents generated subsequent to the first request. **CP 66-67.**

On January 26, 2006, the City confirmed that it had no additional documents and reaffirmed the claim of exemptions in its August 17, 2005 response. **CP 70.** The City's letter, disagreeing with RHA's legal interpretation and reaffirming its position, succeeded only in prompting an additional threatening letter on February 2, 2006, from RHA's counsel disagreeing with the City's claim of exemptions. **CP 74.** The City's claim of exemption, however, never wavered from the original claim made on August 17, 2005.

In response to the second public records request in the January 25, 2006 letter, the City responded in several installments as allowed by RCW 42.56.120. First, the City provided a copy of the City Budget, as requested, on February 10, 2006. **CP 1153.** On March 1, 2006, the City provided approximately 386 pages in response to the first category requested concerning costs of the crime free rental housing program, some of which were duplicative of documents responsive to the first request. **CP 1492.** Additional documents responsive to the remaining categories in the January 25, 2006, request were provided on March 8, 2006, and again on March 21, 2006. **CP 2176-78.**

Appellant incorrectly claims that the City continued to respond to the original July 2005 records request in 2006 and 2007. This is not what the trial court found, nor is it consistent with any of the evidence below. The subsequent production of records responded to RHA's second records request on an installment basis. **CP 1151-1152.** None of the responses in February or March 2006 were in response to the July 2005 records request. *Id.*

Appellant also claims that the City produced additional records in February 2007 in response to the July 2005 request.

This is also incorrect. The documents provided in February 2007 were created after this action was filed in an effort to settle this suit and did not exist when RHA made its July 2005 records request.<sup>2</sup>

**CP 2223.** RHA makes the curious and illogical argument that a voluntary production of additional records made after the commencement of the action is the event from which the statute of limitations must be measured. It is logically impossible to judge the timeliness of the Complaint, filed in January 2007, by subsequent events.

Despite having provided a description of the documents claimed to be exempt and an explanation of how these exemptions applied to the City Attorney's files, RHA continued to press for additional description of each document in the City Attorney's files and specification of all exemptions applicable to each document. The City provided such a list on April 14, 2006. **CP 80.**<sup>3</sup>

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<sup>2</sup> The reports provided were specially created in February 2007 for the meeting between counsel. Although some of the information contained in the reports predated the July 2005 request, the report itself did not exist. An agency has no duty to create records that do not exist in response to a public records request. *Smith v. Okanogan County*, 100 Wn.App. 7, 14, 994 P.2d 857 (2000). The Act applies to requests for identifiable public records, not to a general request for information. *Bonamy v. City of Seattle*, 92 Wn.App. 403, 409, 960 P.2d 447 (1998). An agency has no duty to research or explain its public records. *Bonamy*, 92 Wn.App. at 409; *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, 963 P.2d 869 (1998).

<sup>3</sup> RHA still was not satisfied, demanding additional information about twelve of the listed documents. The City provided this information on June 16, 2006. **CP 88.**

Appellant did not file a lawsuit within the one year period of the City's August 17, 2005 claim of exemption for the City Attorney's files. Instead, they waited for seventeen months, finally filing this action on January 16, 2007. The parties stipulated to a briefing schedule pursuant to the show cause provisions of RCW 42.56.550(2). Meanwhile, the parties attempted to negotiate a settlement of this matter and shortly before the hearing, the City disclosed all of the files previously withheld. **CP 47.**

Despite this disclosure, no settlement was reached and the parties proceeded to brief the matter. In its opening brief, the City moved to dismiss for failure to comply with the statute of limitations. RHA disagreed and sought statutory penalties commencing with the City's August 17, 2005 response. Oral argument of the case was conducted before Judge Deborah Fleck in King County Superior Court on July 6, 2007. After considering the briefs and argument, Judge Fleck issued a letter opinion granting the City's Motion to Dismiss. **CP 2283.** That opinion made several key findings to support her dismissal of this matter:

- Judge Fleck found that statute's plain language mandates that the statute of limitations runs from date of claim of the exemption, not upon provision of a privilege log. **CP 2288.**

- Judge Fleck found that the City responded to RHA's July 20, 2005 request on August 17, 2005 by claiming exemptions for the City Attorney's files, thereby commencing the one year statute of limitations period. **CP 2288.**
- Judge Fleck found that the City did not waive the statute of limitations. **CP 2289.**
- Judge Fleck found that City did not litigate for prolonged period without raising the statute of limitations defense, distinguishing *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002). **CP 2289.**
- Judge Fleck found that City responded to RHA's second records request in installments, but did not do so in responding to its first request. **CP 2289.**
- Judge Fleck found that applying the statute of limitations to a date other than the date of the agency's claim of exemption as argued by RHA would create uncertainty and would create confusion as to dates from which the statute runs. **CP 2288-89.**
- Judge Fleck found that RHA's attorney was provided with proper privilege log four months prior to end of one year statute of limitations period. **CP 2289.**

Because she ruled that the statute of limitations barred RHA's claims, Judge Fleck did not consider the merits of the claimed exemptions. **CP 2290.** RHA thereafter appealed the order dismissing their Complaint based on the violation of the statute of limitations directly to this Court. **CP 2291.**

#### IV. ARGUMENT

**A. THE STATUTE OF LIMITATIONS IN RCW 42.56.550(6) IS UNAMBIGUOUS AND COMMENCES WHEN AGENCY MAKES A CLAIM OF EXEMPTION IN RESPONSE TO RECORDS REQUEST.**

The Public Records Act requires a plaintiff to bring claims within one year from the date the agency claims an exemption in response to a request. RCW 42.56.550(6) is explicit and clear, mandating:

(6) Actions under this section must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

(Emphasis added).

Here, the City claimed exemption for records requested from City Attorney's files in its August 17, 2005 response. This was also the last production of records in response to the July 2005 request. As such, the statute of limitations set forth in RCW 42.56.550(6) began to run on the response to the first public records request on August 17, 2005. The statute of limitations expired one year later on August 17, 2006. RHA did not file their lawsuit until January 17, 2007, some five months after the expiration of the statutory limitations period. Hence, the trial court lacked jurisdiction over

the claims presented in the complaint and properly dismissed the case.

On its face, the statute of limitations begins to run when an agency makes a "claim of exemption". RCW 42.56.550(6). This term is not defined by the statute. In such cases, courts look to the plain meaning of the statute and will carry out its clear and unambiguous terms. *Ockerman v. King County Dep't of Dev. & Envt'l Servs.*, 102 Wn.App. 212, 216, 6 P.3d 1214 (2000). The Court will also consult dictionary definitions to determine the meaning of words used. *Servais v. Port of Bellingham*, 127 Wn.2d 820, 830, 904 P.2d 11224 (1995). Here, there is no ambiguity and the court need look no further than the language used in RCW 42.56.550(6) do uphold the dismissal of RHA's untimely complaint.

Webster's defines a "claim" as "an assertion of something as a fact". Webster's College Dictionary, Random House, 1991.<sup>4</sup> The meaning of "exemption" is clear from the fabric of the statute, which specifies numerous exemptions from the requirement to disclose public records. Hence, the statute of limitations commences under the plain language of the statute when an agency

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<sup>4</sup> See also, Black's Law Dictionary, 6<sup>th</sup> Ed., 1990 (defining "claim" as "to demand as one's own or as one's right; to assert; to urge; to insist").

asserts a right to withhold records under the exemptions set forth in Chapter 42.56 or other statute.

Here, the City asserted such a right on August 17, 2005 when it identified records from the City Attorney's files and claimed exemption under the controversy exemption, attorney-client privilege and deliberative process exemption. The City's response claimed the statutory exemptions as follows:

We are not providing a number of documents from the City Attorney's Office file, which are described as follows:

**Legal Department's Packet No. 1:**

The packet excludes approximately 600 pages of documents that are exempt from public disclosure per RCW 42.17.310(1)(i)<sup>5</sup> because they are drafts, notes, and interagency memoranda not relied on in public action; or because they are exempt from disclosure under RCW 42.17.310(1)(j)<sup>6</sup> because they would not be subject to discovery, as attorney work product or subject to attorney/client privilege.

- Interoffice legal opinions and memoranda;
- Copies of reported cases decided by the Washington State Supreme Court and Courts of Appeal dealing with rental housing ordinances;
- Copies of newspaper articles regarding the crime free rental housing ordinance & possible litigation;

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<sup>5</sup> This is the "deliberative process" exemption. It was recodified as RCW 42.56.290 by Chapter 274, §408, Laws of 2005, effective July 1, 2006.

<sup>6</sup> This is the "c controversy" exemption, that exempts documents relevant to a controversy if those records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts. It was recodified as RCW 42.56.280 by Chapter 274, Laws of 2005, § 409, effective July 1, 2006.

- Copies of treatises & articles dealing with the legality of crime-free rental housing ordinances;
- Copies of treatises & articles dealing with the Washington Landlord/Tenant Act (RCW 59.18);
- Attorney notes regarding preparation for teaching the "legal issues" portion of the Landlord Training Workshop;
- Copies of similar crime-free rental housing ordinances from other municipalities;
- Copies of 'edits, drafts, redrafts & redlined versions" of the crime-free rental housing ordinance; and
- Copies of 'edits, drafts, redrafts & redlined versions" of the Agenda Items prepared for presentation to the City Council.

**CP 58-59** (emphasis added).

This is a clear assertion of the right not to disclose the identified documents under the statute and constitutes a "claim of exemption" under RCW 42.56.550(6). In his letters disputing the validity of this claim, RHA's legal counsel recognized that this letter was such a claim, stating in his January 25, 2006 letter:

The City produced selective public records on August 17, 2005, while admittedly withholding approximately 600 pages of unidentified responsive documents, generally claiming them to be exempt under RCW 42.17.310(1)(i) or (j).

**CP 65** (emphasis added).

Thus, all parties clearly knew on August 17, 2005 that the City was claiming exemptions for the City Attorney files listed

above. At that point, RHA's cause of action had accrued and it was required to file suit to compel disclosure within a period of one year.

**B. RCW 42.56.550(6) DOES NOT REQUIRE THAT A DETAILED PRIVILEGE LOG BE PROVIDED IN ORDER TO COMMENCE THE ONE YEAR STATUTE OF LIMITATIONS.**

Appellant urges an elaborate construction of the RCW 42.56.550(5) Public Records Act to circumnavigate around its clear language and hold that the August 2005 response was not a "claim of exemption" because the City did not adequately explain its claim by including a privilege log. Appellant's Brief at 21-22. Appellant requests the court to use the liberal construction of the Act, despite clear limitations on the ability to the courts to impose by judicial fiat language that was simply not used by the Legislature.

The proper starting place for construing RCW 42.56.550(6) is with the general rules for interpreting statutes. Our courts have routinely used these principles in addition to the liberal construction afforded the Public Records Act. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 606, 963 P.2d 869 (1998). In interpreting the Public Records Act, courts are to carry out the clear and unambiguous terms used by the Legislature. *Ockerman v. King County*, 102 Wn.App. 212, 216, 6 P.3d 1214 (2000); *Limstrom* at 606. This follows the traditional rule that courts are to give

statutory terms their plain meaning and need not engage in statutory construction of unambiguous terms. *Ockerman*, 102 Wn.App. at 216; *Sheehan v. King County*, 114 Wn.App. 325, 337, 57 P.3d 307 (2002).

*Ockerman* is particularly relevant because it interpreted procedural provisions of the Public Records Act. There, the Court was asked to determine whether the Act required an agency to explain the basis for its estimate of time needed to respond to a public records request. The court held that the provisions of the Act were unambiguous and should be interpreted according to its plain meaning. The Court stated:

We do not construe a statute that is clear and unambiguous on its face. We assume that the legislature means exactly what it says, and we give words their plain and ordinary meaning. Statutes are construed as a whole, to give effect to all language and to harmonize all provisions.

102 Wn.App. at 216 (citations omitted).

Although the Act directs a narrow interpretation of its exemptions in order to effectuate its broad purpose, this case does not involve interpretation of exemptions from disclosure, but the statute of limitations. One purpose of a statute of limitations is to provide finality. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 166 P.3d 662 (2007).

A statute of limitations effectuates two different policies. First is the policy of repose, by which a statute of limitations is intended to instill a measure of certainty and finality into one's affairs by eliminating the fears and burdens of threatened litigation. *Kittinger v. Boeing Co.*, 21 Wn.App. 484, 585 P.2d 812 (1978). Secondly, a statute of limitation is designed to shield defendants and judicial system from stale claims and is a declaration of legislative policy to be respected by courts. *O'Neil v. Estate of Murtha*, 89 Wn.App. 67, 947 P.2d 1252 (1997). Such a defense is not unconscionable, and is entitled to same consideration as any other defense. *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 403 P.2d 880 (1965).

Here, the one year statute of limitations was adopted to provide municipalities with finality and repose. It was adopted in the legislative session following the Supreme Court's decision in *Yousoufian v. Sims*, 152 Wn.2d 421, 436-38, 98 P.3d 463 (2004), which held that the statute of limitations was five years, during which daily penalties would continue to accrue, even where the plaintiff had caused unnecessary delay in resolution of the dispute.<sup>7</sup>

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<sup>7</sup> In *Yousoufian*, the plaintiff waited for two years from the agency's last response indicating that it had no responsive records until he filed a lawsuit. The trial court found that 527 days were due to his unreasonable delay and refused to assess penalties for that period. The Supreme Court reversed and ordered a mandatory penalty of at least \$5 per day for this period, 152 Wn.2d at 427-28.

The *Yousoufian* court reached this result largely because the legislature had prescribed a five year statute of limitations. *Id.*

In response, the 2005 Legislature enacted SSHB 1758 which reduced the statute of limitations from five years to one. Laws of 2005, Ch. 483. In so doing, the Legislature was concerned about the fiscal impact of daily penalties upon local government, which the original bill proposed to increase. See House Bill Report, 2SHB 1758 (attached as Appendix A). The reduction of the statute of limitations eliminated the unfair and prolonged exposure present in *Yousoufian*, providing repose where a lawsuit was not brought within one year of the agency's claim of exemption.

**1. The Statute of Limitations Runs from August 17, 2005, Which Is the Date the City Denied the Request and Claimed That the Documents Are Exempt.**

The Appellant attempts to avoid application of the statute of limitations by arguing that it does not commence until the agency has provided a detailed identification of each record that is withheld. This is not consistent with either RCW 42.56.210(3) or RCW 42.56.550(6) and violates basic principles governing interpretation of statutes of limitation.

First, statutes of limitation are to be interpreted according to the plain language used by the legislature. Statutes of limitation are

subject to the rules of statutory construction and are considered as beneficial in their purpose. *Guy F. Atkinson Co. v. State*, 66 Wn.2d 570, 572-3, 403 P.2d 880 (1965) The courts will not read terms that the legislature has not used into a statute of limitations. *Guy F. Atkinson Co.*, 66 Wn.2d at 575, quoting *Rushlight v. McLain*, 28 Wn.2d 189, 201, 182 P.2d 62 (1947).<sup>8</sup>

Secondly, doubts as to the meaning are to be construed in favor of the government. When courts interpret a statute of limitations for suits against the government, the statute “ ‘must receive a strict construction in favor of the Government.’ ” *Badaracco v. Commissioner*, 464 U.S. 386, 398, 104 S. Ct. 756, 78 L. Ed. 2d 549 (1984) (quoting *E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456, 462, 44 S. Ct. 364, 68 L. Ed. 788 (1924)).

Third, the interpretation advanced by the Appellant would create chaos in application of statutes of limitation and a unilateral ability for plaintiffs to extend the limitation period merely by questioning the amount of detail in an agency’s response. The date of the agency’s “claim of exemption” is the date that they respond to

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<sup>8</sup> *Guy F. Atkinson Co.* rejected an argument that the limitation on a period for refund of taxes should not include the time when an audit was in progress, stating ‘ . . . for us to follow appellant’s argument would be to read into the statute something that the legislature did not put there. Courts will not read into statutes of limitations exceptions not embodied therein.’ 66 Wn.2d at 575.

the request by denying the record and explaining the basis for the denial as required by RCW 42.56.520. This date does not depend on the Appellant's perceived need for additional detail as to the application of the claimed exemptions. To accept the Appellant's argument would interject uncertainty into when any response was sufficient to trigger the one year statute. Such an interpretation is plainly at odds with how statutes are to be interpreted.

Judge Fleck correctly recognized the potential confusion and uncertainty created by the Appellant's interpretation. In her decision, **CP 2288-89**, she declared:

The determination of whether a statute of limitations had run would be confounded significantly if it were measured by the content of the response rather than the clear line created by a government entity's claim of an exemption or the last production in the case of installment productions.

Judge Fleck's ruling is faithful to the plain language of the statute and principles of statutory construction. Her interpretation is in harmony with other portions of the Public Records Act and is designed to effectuate a consistent, predictable statutory scheme. *Koenig v. City of Des Moines*, 158 Wn.2d 173, 184, 142 P.3d 162 (2006). Commencing the statute at the time that the cause of action for denial of the records arises provides a consistent,

harmonious and predictable limitations period. That date is the date the agency denies a record request and claims an exemption. Such an interpretation is also consistent with the acts that the statute defines as creating a cause of action under RCW 42.56.550(1) which triggers judicial review when a person is “denied an opportunity to inspect or copy a public record by an agency”. Here, Judge Fleck correctly found that the statute of limitations ran from the date of the agency’s denial and the claim of exemption, which indisputably occurred on August 17, 2005.

Appellant, by contrast, offers an interpretation that requires adding new language into RCW 42.56.550(6) that the Legislature did not use. This statutory construction requires the Court to insert the concept of production of a privilege log into the statute of limitations, language that the legislature could have used, but chose not to.

The trial court here correctly judged the statute of limitations by the date it is asserted, as is mandated by the unambiguous language of RCW 42.56.550(6). The court rejected Appellant’s attempts to alter the clear date required by the statute by questioning whether the content of the “claim of exemption” was satisfactory. This novel theory is at odds with prior interpretations

of the statute that demonstrate that the requirements of an agency response are independent from the statute of limitations and provisions governing judicial review. *PAWS v. University of Washington (PAWS II)*, 125 Wn.2d 243, 253, 884 P.2d 592 (1994); *Cowles Publishing Co. v. City of Spokane*, 69 Wn.App. 678, 683, 849 P.2d 1271 (1993) (agency may argue new reasons at show cause hearing even if stated reasons for refusing disclosure are invalid). An agency should no more be bound by the perceived inadequacies in the content of its response than it is bound to the exemptions identified in its response to the request for public records<sup>9</sup>. Since the agency may argue a different exemption on judicial review, it is clear that the statute of limitations is triggered by the “claim” of exemption, not the content of that claim. RCW 42.56.550(6). Here, the date of the “claim” of exemption is unquestionably the August 17, 2005 response refusing to disclose the City Attorney’s files.

**2. Appellant’s construction of statute of limitations violates the plain meaning rule.**

Courts “will not, as a general rule, read into statutes of limitation an exception which has not been embodied therein,

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<sup>9</sup> Appellant’s interpretation eviscerates the repose provided by the statute of limitations by allowing it to be extended because the requestor is dissatisfied with the level of detail provided in the agency’s response claiming exemption.

however reasonable such exception may seem, even though the exception would be an equitable one.” *O’Neil v. Estate of Murtha*, 89 Wn.App. at 73-74, citing *Rushlight v. McLain*, 28 Wn.2d 189, 199-200, 182 P.2d 62 (quoting 34 Am.Jur. § 186). Statutes of limitation generally begin to run when the cause of action accrues, that is, when a party has the right to apply to a court for relief, even if that fact is not known to the plaintiff. *O’Neil v. Estate of Murtha*, 89 Wn.App. at 69-70; see also *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 351, 693 P.2d 687 (1985) (cause of action “accrues” when plaintiff discovers or reasonably should have discovered all of essential elements of cause of action).

Appellant’s interpretation would also render the Public Records Act unique among statutes of limitation in that it would not commence from the date when a cause of action accrues, but from the date when Appellant deems the agency response to be satisfactory. Appellant would create a special rule that turns on its own satisfaction with the adequacy of the agency’s claim of exemption. This is a prescription for chaos, not the rule of law.

The Appellant seeks to add language to RCW 42.56.550(6) by requiring a privilege log be provided in order for their to be a “claim of exemption”. This is not found in the language the

legislature actually used. Indeed, in discussing the language of the statute of limitations, Appellant adds “legally sufficient” to the statutory text. Brief at 4. Despite giving lip service to the plain meaning rule, Brief at 22, Appellant does not analyze or even discuss the plain meaning of language used in RCW 42.56.550(6). Instead, they focus on judicial interpretations of RCW 42.56.210(3) in an attempt to add a gloss to the plain, simple language governing the statute of limitations. In so doing, they attempt to define what is an “adequate” or “legally sufficient” claim of exemption. The approach offered by Appellants will only cause confusion and uncertainty in a provision that is intended to provide finality and repose.

The approach suggested by Appellant, Brief at 26, fn.10, adds requirements not found in the language used by the legislature. RHA reads the statute as being triggered by an “adequate” claim of exemption. However, that is not what the legislature stated in RCW 42.56.550(6). RHA then suggests a three part test which is based not on the statute of limitations, but upon RCW 42.56.210(3). The Appellant’s suggested test will only increase uncertainty and foster disputes over the adequacy of an agency’s response. The Appellant’s test is based on the portion of the statute which states:

(3) Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.

RCW 42.56.210(3).

Reliance on *PAWS II* is misplaced, because that case did not discuss or consider the statute of limitations issue presented here. It was decided eleven years before the adoption of RCW 42.56.550(6). *PAWS II* does not mention the statute of limitations or hold that any type of list is a prerequisite to commencing the statute of limitations.

Here, the City followed RCW 42.56.210(3) by identifying the specific exemptions relied upon and explaining how the exemption applied to the records withheld. The Appellant's approach interjects a requirement for a privilege log, which is nowhere to be found in the statute. Indeed, as demonstrated by the facts of this case, the test suggested by RHA will only promote disputes from requestors as to the adequacy of the "particularity" of the agency's description of the records so that the statute of limitations will not run against their claims.

Contrary to Appellant's suggestion, following the plain language of RCW 42.56.550(6) does not render RCW 42.56.210(3) superfluous. RCW 42.56.210(3) uses different statutory language and does not define what constitutes a "claim of exemption". Moreover, leading commentators have agreed with the trial court here in suggesting that the Public Records Act provides remedies for a perceived violation of RCW 42.56.210(3). See *Public Records Act Deskbook: Washington's Public Disclosure and Open Meetings Laws*, WSBA, §16.1(2) (2006) (suggesting that failure to provide a brief explanation of exemptions is actionable as an effective denial of request).

Finally, RHA's interpretation conflicts with the clear statutory language of RCW 42.56.550(6). The limitations period runs from the "claim" of exemption made by the agency, not from when requestors are satisfied as to the adequacy of that claim. To hold otherwise permits a dilatory plaintiff to control the date that a statute of limitations commences merely by arguing that the prior response is inadequate. Respondents are unaware of any statute of limitations that has ever been given such a construction.

**3. Appellant's interpretation undermines the public policy favoring settlement discussions.**

The approach suggested by Appellant also conflicts with the well established policy of encouraging settlement discussions between the parties. This policy is well-engrained in Washington law, and was reaffirmed by a decision issued as this brief is being drafted. In *American Safety Cas. Ins. Co. v. City of Olympia*, No. 79001-9, \_\_ Wn.2d \_\_\_, (Dec. 27, 2007), the Supreme Court refused to toll a contractual claims limitation period during a period of time when negotiations were ongoing between the parties. The Court, slip opinion at 12, stated:

Were we to find that by entering into negotiations a party waives its contractual rights, we would frustrate the negotiation and settlement process. Washington law strongly favors the public policy of settlement over litigation. E.g., *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997) ("[T]he express public policy of this state . . . strongly encourages settlement."); *Seafirst Ctr. Ltd. P'ship v. Erickson*, 127 Wn.2d 355, 366, 898 P.2d 299 (1995) (referring to "Washington's strong public policy of encouraging settlements"); *Haller v. Wallis*, 89 Wn.2d 539, 545, 573 P.2d 1302 (1978) ("[T]he law favors amicable settlement of disputes . . .").

By arguing that the statute of limitations must be extended because the City Attorney agreed to review the City's response, Appellants are seeking the same type of extension rejected in

*American Safety Cas. Ins. Co., supra.* Such a rule would discourage municipal attorneys from negotiating or reviewing disputes for fear that the statute of limitations would be rekindled and their clients would be exposed to greater risk of daily civil penalties.

**C. THE CITY'S AUGUST 17, 2005 CLAIM OF EXEMPTION COMMENCED THE STATUTORY LIMITATIONS PERIOD.**

Appellant suggests that the application of the statute of limitations renders RCW 42.56.210(3) superfluous and that RHA was deprived of the information needed to know whether to sue. This is simply not true under the facts of this case.

First, RHA knew immediately upon receipt of the August 17, 2005 letter that it disagreed with the claim of exemption and immediately threatened to sue over these records. It said so in its October 7, 2005 letter to the City. **CP 60.**

Secondly, RHA was provided a full withholding log in April 2006, over four months before the statute of limitations ran. Hence, it was fully able to make an informed decision about whether to sue, but chose not to do so for its own reasons.

The provisions of *PAWS II* that suggest that a log of documents be provided is not as clear as RHA suggests. Indeed, the

dicta relied upon by RHA acknowledges that the type of identifying information provided by the agency may vary, especially where it would reveal protected content. The core requirement of *PAWS II* is for “all relevant records or portions be identified with particularity”. 125 Wn.2d at 271.

The Attorney General’s Model Rules on implementing the Public Records Act suggest that a log is not the only way that an agency may meet this requirement. The rules only note that a withholding log is “one” way to comply with the mandate of RCW 42.56.210(3). WAC 44-14-04004(4)(b)(ii). Since the Model Rules suggest that a log is only “one” way to comply, presumably there are others, such as the detailed description of the City Attorney’s file contents provided by the City in this case.

RHA trivializes the amount of detail provided by the City’s August 17, 2005 response, which meets the core requirements of *PAWS II* in that it identified the types of documents, explained why they were exempt, and gave a page count of the number of documents involved. Indeed, providing further detail on the cases or treatises being researched would have revealed the City Attorney’s mental impressions, thought processes which the work product doctrine is designed to protect. The City’s description of

the contents of the files withheld does meet the core *PAWS II* requirement and does exactly what RCW 42.56.210(3) requires in providing "a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld."

**D. APPELLANT DID NOT RESUBMIT A NEW PUBLIC RECORDS ACT REQUEST FOR THE SAME RECORDS SOUGHT IN ITS JULY 2005 REQUEST SO AS TO RECOMMENCE THE STATUTE OF LIMITATIONS.**

Appellant's Brief, at 39-41, claims that their January 25, 2006 letter to the City Attorney resubmitted their July 20, 2005 public records request, thereby restarting the statute of limitations. Appellant's claim has no factual support in the record.

First, the January 25, 2006 letter repeated RHA's demand that the City provide a further response to the original July 2005 request. Nothing in the letter indicates that it was a resubmittal of the July records request. Instead, it was written to "demand that the City immediately produce long overdue public records", which RHA's counsel stated were from "our initial request for documents pertaining to the City's Crime Free Housing Ordinance and Program on July 20, 2005." **CP 65.**

At this point, RHA'S counsel knew that he could have sued for penalties and expressly threatened to do so. Continuing his objections, counsel concludes as follows:

It is now January 25, 2006 – more than two months past the City's original estimation of November 18 and nearly five months from when the documents should have been produced in the first instance. Unless we receive immediate assurance from the City that the responsive documents will be promptly produced, we will file suit under the PDA to compel production of the documents. Further, we will seek an award of monetary sanctions and attorney's fees and costs for bringing such an action.

**CP 65-66.**

The only request for public records in the January 25, 2006 letter was for documents created after the time period covered by the initial public records request. It was in bold print and was labeled as a "new PDA Request for More Recent Documents". **CP 66.** The request expressly excluded documents pursuant to the prior July 20, 2005 request. *Id.*

In order for RHA to have "resubmitted" a valid request for public records, they are required to notify the City that it is making a new request under the Public Records Act. While there is no official format for such a request, a party seeking documents must, at a minimum, provide notice that the request is made pursuant to

the Act and identify the documents with reasonable clarity to allow the agency to locate them. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2005); *Wood v. Lowe*, 102 Wn.App. 872, 878, 10 P.3d 494 (2000).

The January 25, 2006 letter contained one and only one specific identifiable records request under the Public Records Act. It was not a restatement of the July 2005 request, but a supplementary request for additional documents concerning the rental housing program. The City responded to this request in a series of installments and RHA has not identified any violations concerning this second request.

RHA now contends that its ongoing disagreement with the City's claim of exemption rekindled the statute of limitations because the City adhered to its August 17, 2005 response. However, counsel's legal disagreement and demand for a change of position is not, in itself, a new public records request that meets the requirements set forth in *Hangartner* and *Wood* to notify the City that it was making a new public records request.

Finally, neither the Appellant nor the City treated the demands of counsel as a new request for public records. The new argument that Mr. Witek's ongoing demands for reversal of the

City's position constituted new public records requests that revived the statute of limitations is belied by the actions of the parties. If Witek believed that these were new requests, he would have said so. He did not, either in his letters to the City or his declaration before the trial court. If it had been considered a new records request, each such demand would have required a response pursuant RCW 42.56.520, which the City did not provide, and which RHA did not request. This dispute has always concerned the August 17, 2005 claim of exemption, of which RHA was fully aware and simply delayed bringing to the court for resolution. Neither the City nor RHA treated the multiple letters between counsel as new records requests. It is instructive that the Complaint does not contend that the January 25, 2006 letter was a "resubmittal" of the original request, but a demand for a response to the July 20 request. **CP 5.**

**E. THE FEDERAL FREEDOM OF INFORMATION ACT SUPPORTS COMMENCEMENT OF THE STATUTE OF LIMITATIONS FROM THE DATE THE CAUSE OF ACTION ACCRUES, WHICH IS AUGUST 17, 2005.**

Appellant urges the court to look to federal cases under the Freedom of Information Act, 5 U.S.C. §552 *et seq.* (FOIA) to guide its interpretation of how the statute of limitations should be applied. Although the statute of limitations under FOIA is

substantially different than the Public Records Act scheme because of the requirement to exhaust administrative remedies, the rule adopted under FOIA supports strict application of the statute of limitations from the date the cause of action first accrues. If the court follows the rule in federal law under FOIA, this case should be dismissed.

First, the trigger for the statute of limitations under the federal scheme is the exhaustion of administrative remedies. As discussed in *Aftergood v. CIA*, 225 F.Supp.2d 27 (D.D.C. 2002) and *Spannaus v. Department of Justice*, 824 F.2d 52 ( D.C. Cir. 1987), the federal six year statute of limitations begins to run when the cause of action accrues, which occurs once a claimant has constructively exhausted administrative remedies. *Aftergood*, 225 F.Supp.2d at 29; *Spannaus*, 824 F.2d at 56-57.<sup>10</sup> By contrast, the Public Records Act does not require exhaustion of administrative remedies before a requestor can file suit. *Kleven v. City of Des Moines*, 111 Wn.App. 284, 292, 44 P.3d 887 (2002). Hence, under state law, the requestor's cause of action for denial of a public records request accrues immediately upon receipt an agency's denial of the request.

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<sup>10</sup> Under FOIA, Constructive exhaustion occurs when the time limits for responding to a request or an appeal expire. *Aftergood*, 225 F.Supp.2d at 29.

Although these cases recognize that a requestor can restart the process by re-filing the FOIA request, this did not prevent dismissal of the untimely action in *Aftergood*. Moreover, there was no dispute that the requestor had clearly re-filed the same records years after the initial request was denied. Here, nothing in the letters between RHA's legal counsel and the City Attorney stated an intention to "resubmit" the same request, so as to put the City on notice that there was a new request as required by *Hangartner* and *Wood*. Hence, there has been no "re-filing" as in *Aftergood* or *Spannaus*.

The federal cases cited by Appellants actually support the proposition that the statute of limitations began to run when RHA's cause of action "first accrued", that is, "as soon as (but not before) the person challenging the agency action can institute and maintain a suit in court. *Spannaus*, 824 F.2d at 57. Under federal law, a person can sue when administrative remedies are constructively exhausted. Under state law, no exhaustion of remedies is required, and a requestor can file suit upon receipt of the denial by the agency and its claim of exemption.

*Spannaus* further supports the City's position because the court refused to toll the statute of limitations during the 20 month

period when an administrative appeal was pending. Instead, the court adhered to the rule that the statute of limitations ran from the time when the requestor could have filed its lawsuit. 824 F.2d at 60-61. Thus, the statute ran from the date the right to sue accrued, including a period of time when the agency was reconsidering its initial denial via an administrative appeal. This supports the argument that the statute of limitations was running while the City Attorney was reviewing the City's prior denial of records.

**F. THE CITY DID NOT RESPOND TO THE JULY 2005 RECORDS REQUEST ON A PARTIAL OR INSTALLMENT BASIS.**

Appellant argues that the August 17, 2005 "claim of exemption" is not the correct trigger for the statute of limitations in this case. RHA contends that the City responded to the July 20, 2005 request in installments, so that their claims did not accrue until the final production of records. Appellant is factually incorrect. The City fully responded to the July 20, 2005 request by producing 583 pages of records and claiming exemption of the City Attorney files in its August 17, 2005 response. **CP 53-59.**

Appellant contends that the City produced records responsive to RHA's July 2005 request in March 2006 and February 2007. Brief at 41. Neither of these document productions

was in response to the July 2005 request. The March 2006 production is described in the declaration of Vicki Sheckler, when three installments of records were produced in response to the Appellant's second public records request, dated January 25, 2006. **CP 1152.**

The February 2007 document production provided documents that did not exist when the original July 2005 request was made. **CP 2223.** The documents were created by the City in an effort to negotiate a settlement with RHA's counsel, after this lawsuit had already been filed. *Id.* As explained by the Reply Declaration of Assistant City Attorney Richard Brown, the City had previously provided the data from which these reports were generated in response to the second records request. *Id.*

Appellant makes the contradictory argument that the provision of documents that did not exist when they made their initial public records request is the date from which the statute of limitations should run. The documents produced in response to the July 20, 2005 public records request were not produced in installments, nor could the records claimed to be "installments" have been produced when the City responded in August 2005. They did not exist at the time. The City had no obligation to create new

records, *Smith v. Okanogan County*, 100 Wn.App. 7, 13-14, 994 P.2d 857 (2000), nor is there a duty to seasonably supplement a response with records created after the response is provided, as may arise in civil discovery under CR 26(e).

**G. THE CITY DID NOT WAIVE OR AGREE TO ANY EXTENSION OF THE STATUTE OF LIMITATIONS.**

The City did not waive the statute of limitations defense as alleged by RHA. Brief at 44. RHA cites *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002) which held that a defendant may not seek dismissal based on noncompliance with claims filing requirements after litigating a case for four years while allowing the statute of limitations to elapse and preclude re-filing of the action after compliance with the claim filing statute. The court found that it was inconsistent for the county to have failed to clarify its defense in responses to interrogatories, and failing to raise the issue in a summary judgment motion filed by the County on the merits. Because the statute of limitations expired in the meantime, the County attempted to obtain a dismissal of the case three days before trial, to the obvious prejudice of the plaintiff. The court disallowed reliance on the claim filing defense in these

circumstances finding it was waived by the County's litigating the matter for 45 months without raising the defense.

Here, the City timely raised the statute of limitations defense in its answer and in its opening brief to show cause why it is not out of compliance with the Act. This was done pursuant to a stipulated case schedule, just six months after the filing of the complaint. There has been no discovery or prior motions filed in this case. Indeed, the City's opening brief was the first opportunity to raise this defense with the trial court. There is no "misdirection" or undue delay on the City's part, nor is there any prejudice identified by the Appellant.

Unlike *King*, where the litigation was filed prior to the expiration of the statute of limitations, but was prolonged so that the defendant sought dismissal based on the claim filing statute after the statute of limitations expired, the statute here ran before the case was filed and the court lacked jurisdiction over this matter under RCW 42.56.550(6). The City has not misused a defense by delaying a motion for dismissal until the statute expired. The statute of limitations expired five months before this case was ever filed.

Likewise, none of the correspondence cited to by the Appellant alters the date for commencement of the statute of limitations. None of the City's letters promised any extension of the limitations period contained in RCW 42.56.550(6). None of the letters altered or retreated from the August 17, 2005 claim of exemption for the City Attorney's files. Indeed, the City consistently reaffirmed and adhered to that claim of exemption in its letters of October 12, 2005 and January 26, 2005. **CP 63, 69.**

Indeed, the detail that the Appellant asked for under *PAWS II* was provided four months prior to the expiration of the one year statute of limitations. As Mr. Witek's declaration acknowledged, at ¶¶ 22-25, he received the information in April 2006, and was actively discussing the possibility of a lawsuit with the City Attorney in June 2006, two months before the expiration of the statute of limitations. In these dealings, the City Attorney did not agree to toll the statute of limitations, and requested only that RHA allow her time to respond to the anticipated show cause motion if a lawsuit was filed while she was on vacation. **CP 2120.** RHA has never offered any explanation of why it did not file its lawsuit within the remaining four months, nor has it explained why it took them

another five months to file the lawsuit.<sup>11</sup> It is certainly not the City's conduct that caused the Appellant's attorneys to delay filing of this action until after the one year statute had expired.

## VI. CONCLUSION

Appellant has no one to blame but itself and its legal counsel for failing to bring this action within one year of the City's claim of exemption. The City's August 17, 2005 response of was clear and unequivocal in claiming that the City Attorney's files were exempt from disclosure, describing both the documents withheld and identifying the applicable statutory exemptions.

RHA's legal counsel chose not to bring suit within one year, but instead commenced a battle over the adequacy of the City's claim. When the City's claim of exemption was received, RHA's attorney knew enough to threaten litigation, a threat which was not carried out within the year allowed by the applicable statute of limitations. Because RHA delayed beyond the one year allowed by

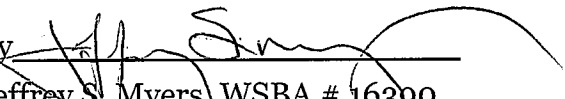
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<sup>11</sup> The only plausible explanations for RHA's delay are that their legal counsel was unaware of the one year statute of limitations or that RHA hoped to maximize the amount of daily penalties that would be applicable in its suit, as such penalties continue to accrue despite delays caused by plaintiffs, which has been held not to provide a basis for a court to refuse to award penalties. *Yousoufian v. Sims*, 152 Wn.2d 421, 437-38, 98 P.3d 463 (2004). The rule suggested by RHA unduly increases the amount of daily penalties and attorney's fees that public funds are put at risk. This undermines the purpose of the statute of limitations to limit such exposure to a one year period running from the agency's claim of exemption.

RCW 42.56.550(6), their complaint was properly dismissed by the Superior Court. This Court should affirm that dismissal.

Respectfully submitted this 28<sup>th</sup> day of December, 2007.

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH

By   
Jeffrey S. Myers, WSBA # 16390  
Attorneys for City of Des Moines

# **APPENDIX A**

# HOUSE BILL REPORT

## 2SHB 1758

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### As Passed Legislature

**Title:** An act relating to public disclosure.

**Brief Description:** Revising public disclosure law.

**Sponsors:** By House Committee on Appropriations (originally sponsored by Representatives Kessler, Nixon, Haigh, Chandler, Clements, Schindler, Hunt, Hunter, Hinkle, Takko, B. Sullivan, Miloscia, Buck and Shabro; by request of Attorney General).

**Brief History:**

**Committee Activity:**

State Government Operations & Accountability: 2/9/05, 3/2/05 [DPS];  
Appropriations: 3/5/05 [DP2S(w/o sub SGOA)].

**Floor Activity:**

Passed House: 3/15/05, 89-6.  
Senate Amended.  
Passed Senate: 4/11/05, 42-4.  
House Refuses to Concur.  
Senate Receded.  
Senate Amended.  
Passed Senate: 4/21/05, 47-0.  
House Concurred.  
Passed House: 4/21/05, 97-0.  
Passed Legislature.

### Brief Summary of Second Substitute Bill

- Prohibits agencies from denying public records requests because they are overly broad; allows agencies to respond to requests on a partial or installment basis.
- Requires the Attorney General to adopt a model rule on public records disclosure
- Allows an agency to ask for a deposit or charge per installment for public records requests.
- Allows an agency to cease fulfilling a request if an installment is not picked up.
- Changes the venue for certain public records-related suits against counties.

- Imposes a one year statute of limitations for certain public records-related suits.

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## HOUSE COMMITTEE ON STATE GOVERNMENT OPERATIONS & ACCOUNTABILITY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Haigh, Chair; Green, Vice Chair; Nixon, Ranking Minority Member; Clements, Assistant Ranking Minority Member; McDermott, Miloscia, Schindler and Sump.

**Minority Report:** Do not pass. Signed by 1 member: Representative Hunt.

**Staff:** Jim Morishima (786-7191).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on State Government Operations & Accountability. Signed by 28 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Alexander, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; McDonald, Assistant Ranking Minority Member; Armstrong, Bailey, Buri, Clements, Cody, Conway, Darneille, Dunshee, Grant, Haigh, Hinkle, Hunter, Kagi, Kenney, Kessler, Linville, McDermott, Miloscia, Pearson, Priest, Schual-Berke, Talcott and Walsh.

**Staff:** Owen Rowe (786-7391).

### **Background:**

The Public Disclosure Act (PDA) requires all state and local government agencies to make all public records available for public inspection and copying unless they fall within certain statutory exemptions. The provisions requiring public records disclosure must be interpreted liberally and the exceptions narrowly in order to effectuate a general policy favoring disclosure.

For example, records that are relevant to a controversy to which a state or local agency is a party, but would not be available to another party under the superior court rules of pretrial discovery, are exempt from public disclosure. The Washington Supreme Court has defined "relevant to a controversy" as "completed, existing, or reasonably anticipated litigation." Dawson v. Daly, 120 Wn.2d 782, 791 (1993).

### I. Requirements for Maintaining Records

Public records must be made available for inspection and copying during normal office hours. State and local agencies may make reasonable rules and regulations to provide full access to

public records, to protect public records from damage, and to prevent excessive interference with other essential functions of the agencies.

State and local agencies are required to maintain indexes providing identifying information regarding certain records. Local agencies do not have to provide an index if doing so would be unduly burdensome. However, such local agencies must issue and publish a formal order specifying the reasons maintaining an index would be unduly burdensome and make available any indexes maintained for agency use.

## II. Responding to Requests

Responses to requests for public records must be made promptly. Within five business days of a request, an agency must:

- provide the record;
- acknowledge receipt of the request and provide a reasonable estimate of the time that is required to respond to the request. Additional time may be taken to clarify the intent of the request, to locate the requested information, to notify third persons or agencies affected by the request, or to determine whether the requested information is protected by an exemption; or
- deny the request.

The Washington Supreme Court recently ruled that a public agency does not have to comply with an overbroad request. Hangartner v. City of Seattle, 151 Wn.2d 439, 448 (2004).

According to the court, a proper request for public records "must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents" (emphasis original). Id.

## III. Copying Public Records

An agency must allow the public to use its facilities for copying public records unless to do so would unreasonably disrupt the operation of the agency. Agencies may not charge for locating public documents and making them available for copying. However, an agency may impose a reasonable charge for providing copies of public records and for the use of agency equipment. Charges for photocopying may not exceed the actual per page cost published by the agency. If the agency has not published a per page costs for copying, the costs may not exceed 15 cents per page.

## IV. Judicial Remedies

A person who is denied a public record or who believes an agency's time estimate is unreasonable may appeal the agency decision in the superior court of the county in which the record is maintained. In such court actions, the agency has the burden to prove, by a preponderance of the evidence, that the agency action was valid. If the person prevails in the action, he or she must be awarded all costs, including reasonable attorney fees.

## **Summary of Substitute Bill:**

### I. Requirements for Maintaining Records

By February 1, 2006, the Attorney General must adopt an advisory model rule for state and local agencies addressing:

- providing fullest assistance to requesters;
- fulfilling large requests in the most timely manner;
- fulfilling requests for electronic records; and
- any other issues pertaining to public disclosure as determined by the Attorney General.

## II. Responding to Requests

An agency may not reject or ignore requests to inspect or copy public records solely on the grounds that the request is overly broad. The agency may make records available on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.

Every state and local agency must appoint and publicly identify an individual whose responsibility is to serve as a point of contact for members of the public in requesting disclosure of public records and to oversee the agency's compliance with the public records disclosure requirements of the PDA. An agency's public records officer may appoint an employee or official of another agency as its public records officer. State agencies must publish contact information regarding the public records officer in the state register. Local agencies must publish the contact information in a manner reasonably calculated to give notice to the public.

## III. Copying Public Records

An agency may require a deposit not to exceed 10 percent of the estimated cost of providing copies of a request and may charge a person per installment. An agency may cease fulfilling a request if an installment is not claimed or received.

## IV. Judicial Remedies

Actions against a county involving a person who is denied a public record or who believes an agency's time estimate is unreasonable may be brought in the superior court of the county or in either of the two judicial districts nearest to the county. Any action involving a person who is denied a public record or believes an agency's time estimate is unreasonable must be filed within one year of the agency's claim of exemption or the last production of a record on a partial or installment basis.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:** (In support) It is important that people have access to government so that the public can see what agencies are doing. Every public document requested from an agency should be disclosed without discussion. This bill will reduce litigation, make it easier for

people to get a record, and make it easier for agencies to follow the PDA. This bill codifies the attorney-client privilege to make it clear when the privilege applies; this will help prevent abuses of the attorney-client privilege exemption. The attorney-client privilege should not be expanded. A document should not be shielded simply because litigation may take place at some unidentified future time. This bill will help stop abuses of the "overbreadth" exemption identified in Hangartner. Public agencies should not be exempt from providing information to the people they serve.

(Concerns) The competing concerns of the PDA should be kept in mind: accountability, protection of private and confidential information, and maintaining government integrity and efficiency. The attorney-client privilege provisions of the bill may serve to codify the Hangartner decision. It is not clear that an attorney-client privilege exists for public lawyers. Hangartner changed the state of the law; prior to the decision, the relevant exemption was the "controversy" exemption.

**Testimony Against:** There needs to be a balance between the citizens' right to know, privacy and trust, and government efficiency. Hangartner did not affect the status of the law with regard to attorney-client privilege; the decision simply re-affirmed long-standing practice. There is no reason to believe that the attorney-client privilege will be abused. Because the attorney-client privilege is defined in the bill differently than it is defined under the current law, it is unclear whether courts can use the developed case law to determine the contours of the privilege. This bill could therefore lead to more litigation and uncertainty. The increased fines in the bill are too high and may give the public incentive to sue agencies. Some people currently use the PDA to blackmail agencies.

**Summary of Second Substitute Bill:**

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:**

**Testimony For:** (Appropriations) None.

**Testimony Against:**

**Testimony Against:** (Appropriations) There are concerns with this bill and the fiscal impact on local governments. The local government fiscal note is indeterminate but there are two specific areas where there would be costs: the inclusion of language that prohibits public agencies from working with the requester to narrow down the request, and the increase in fines from \$100 to \$500. There are 179 cities with a population of less than 5,000 and approximately 100 that have a population of less than 1,500. These fines could quickly become burdensome for less sophisticated local governments.

**Persons Testifying:** (State Government Operations & Accountability) (In support)

Representative Kessler, prime sponsor; Brian Sontag, State Auditor; Rob McKenna, Attorney

General; Randall Gaylord, Washington Association of County Officials; Dan Wood, Washington State Farm Bureau; and Armen Yousoufian.

(Concerns) Michele Earl-Hubbard, Washington Coalition for Open Government; Jason Mercier, Evergreen Freedom Foundation; Bill Vogler, Washington State Association of Counties; Rick Slunaker, Associated General Contractors; Rowland Thompson, Allied Daily Newspapers of Washington; and David Koenig.

(Opposed) Lorriane Wilson and Patti Holmgren, Tacoma Public Schools; Roger Wynne, City of Seattle; Arthur Fitzpatrick, City of Kent for Coalition of Cities; and Denise Stiffarm, King County and Pierce County School Coalitions.

**Persons Testifying:** (Appropriations) Jim Justin, Association of Washington Cities.

**Persons Signed In To Testify But Not Testifying:** (State Government Operations & Accountability) None.

**Persons Signed In To Testify But Not Testifying:** (Appropriations) None.